No. 2720

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA SALMON COMPANY (a corporation),
Plaintiff in Error and Appellant,
vs.
THE TERRITORY OF ALASKA,
Defendant in Error and Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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Filed this.....day of October, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Plaintiff in error and appellant respectfully petitions for a rehearing of this cause upon the following grounds:

In argument we urged a point which in our opinion was decisive of the case at bar, yet in its decision the Court has made no reference thereto.

That point is briefly stated as follows:

By the Act of Congress of March 3, 1899 (30 U. S. St. L. 1253) it was provided by section 460

entitled "Tax on business and trades" that any person prosecuting any of several businesses, should first obtain a license so to do, and pay therefor a license tax fixed thereby, and it provided in regard to "Fisheries: Salmon Canneries, four cents per case; salmon salteries, ten cents per barrel; fish oil works, ten cents per barrel; fertilizer works, twenty cents per ton".

This section, amended to increase the tax on certain businesses was incorporated in the Act of June 6, 1900, entitled "An Act making further provision for a civil government for Alaska" etc. (31 U. S. St. L. 321) as section 29 thereof.

The Act of June 26, 1906, entitled "An Act for the protection and regulation of the fisheries of Alaska (34 U. S. St. L. 478) provided:

> "That every person, company or corporation carrying on the business of canning, curing or preserving fish or manufacturing fish products * * * shall, *in lieu of all other license fees and taxes therefor and thereon,* pay license taxes on their said business and output as follows: Canned salmon, four cents per case; pickled salmon, ten cents per barrel; salt salmon in bulk, five cents per one hundred pounds; fish oil, ten cents per barrel; fertilizer, twenty cents per ton."

The Act of August 24, 1912 (37 U. S. St. L. 512), created a Legislative Assembly in the Territory of Alaska and provided (section 3)

> "that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended or repealed

> by Congress, or by the Legislature; provided, that the authority herein granted to the Legislature to alter, amend, modify and repeal laws in force in Alaska *shall not extend* * * * *to the game, fish and fur seal laws* and laws relating to fur bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade. * * * Provided further, That this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses".

The Act of the Territorial Legislature of April 29, 1915 (Session Laws of Alaska, 1915, Chapter 76) provides that any person prosecuting any of several businesses shall first obtain a license and pay therefor a sum fixed by the Act, especially providing as follows in regard to

> "Fisheries: Salmon canneries, four cents per case on King and Reds or Sockeye; two cents per case on Medium Reds, one cent per case on all others * * * Salteries; two and one-half cents per one hundred pounds on all fish salted or mild cured, except herring"

and also imposing a license tax on fish traps, gill nets and cold storage fish plants.

The Act of June 26, 1906, "for the protection and regulation of the fisheries" is in its entirety a "fish law" within the meaning of the Act of August 24, 1912, creating the legislative assembly. The license tax thereby created, the means therein provided for earning exemption from taxation and the positive guaranty against any additional taxation, are each an essential element in the general scheme of that

Act and each provision, unaltered, unamended and unrepealed is essentially necessary to carry into effect the intent and purpose of that Act as expressed in its title.

That Act has two primary purposes, first, to conserve the salmon as a food supply by regulating the methods and means of taking and preventing wanton destruction and waste, and second, to secure the replenishment of the supply by encouraging artificial propagation.

The first purpose is evidenced by section 3 which forbids the erection of stationary obstructions in narrow streams, for the purpose of capturing salmon or preventing their ascent to spawning grounds; by section 4 which regulates the manner in which nets and traps may be used; by section 5 which specifies times during which salmon may not be taken except by rod, spear or gaff; by section 6 authorizing the Secretary of Commerce to establish spawning grounds, in which fishing shall be prohibited and establish closed seasons in certain streams; by section 8 making wanton waste and destruction unlawful; and by section 11 giving the Secretary of Commerce power to make additional regulations.

The second purpose is evidenced by section 2 which exempts the owners of hatcheries from the license tax on their catch and pack at rate of ten cases for every one thousand fry liberated, provided that such hatcheries pass the inspection of

the Secretary of Commerce and by section 12 providing for the creation of a force to make such inspection.

As to this second purpose the manifest object and intent is that he who takes, but does not replace shall be taxed, but he who takes, and replaces shall be exempt from taxation in proportion to his replacement.

This Act is not therefore primarily a revenue act. The tax thereby imposed is a penalty not a revenue tax. It is imposed as a leverage to induce those whose activities would tend to deplete the supply, to artificially propagate and release fish in order to replenish the supply for the common welfare.

That such was the intent and purpose of Congress is conclusively established by the fact that the license tax on fisheries was lifted bodily from the purely and avowedly revenue provisions of the Acts of March 3, 1899, and June 6, 1900, and incorporated in this Act for the protection and regulation of fisheries. If it were intended only as a revenue measure, there was no reason or object for incorporating it in this Act, and especially so, as the provision was already existent in a general revenue act. Unless it was designed only as a penalty to be imposed on those who would not replenish the streams, there was no object in inserting the express guaranty to those who engage in this business, that this tax, from which exemption might be earned, would be in lieu of all other license fees and taxes.

That this Act in its entirety was a fish law, that every part and portion thereof was intended to coordinate to effect the purpose of the Act, is further evidenced by the fact that the very Act of August 24, 1912, which created the Territorial Legislature also provided for a compilation and codification of all laws applicable to Alaska to be made by the joint committees on territories of the two houses (section 19). These committees of the same Congress which passed the Act did compile the laws which were afterwards published pursuant to a concurrent resolution of the two houses. And this Act *in its entirety* appears in that publication—Compiled Laws of the Territory of Alaska, 1915—as Chapter Three, entitled "Salmon Fisheries" of Title VII, entitled "Fish and Fisheries".

If we are correct in our premise that this is a fish law within the meaning of the Act creating a Territorial Legislature, then under the express provisions of that Act it cannot be repealed, expressly or impliedly, in whole or in part. But the Act to regulate fisheries expressly provides that the tax therein specified shall be "in lieu of all other license fees and taxes", and the Act of the Territorial Legislature does impose another license tax. It is obvious that the latter Act is a repeal of, or an attempt to repeal, the former.

We are aware of the second proviso in the Act creating the Territorial Legislature that "this provision shall not operate to prevent the Legislature from imposing other and additional taxes and

licenses". This however is general language clearly relating to the nearest cognate phrase relating to taxes, viz: "the laws of the United States providing for taxes on business and trade". It is obvious that after this section was originally drafted the clause relating to an act to provide for the construction and maintenance of roads, etc., was inserted, and that originally the second proviso followed immediately after the words "business and trade" for otherwise the words in the second proviso "*this* provision shall not operate" etc., are unnatural. We submit that the correct interpretation of this section is that additional territorial taxes may be imposed on businesses already subject to Federal taxes, unless there is an express prohibition against such taxes in the Act creating the Federal tax, but that additional taxes cannot be imposed, when Congress has guaranteed that there will be no additional tax.

In other words it is inconceivable that when Congress had enacted a law for the protection of fisheries and had worked out a carefully considered and effective scheme for that purpose, when it had expressly forbidden the Territorial Legislature to change or interfere with that scheme, it immediately and in a hidden and ambiguous manner and by adding a further proviso, conferred on the Legislature the power to interfere with that scheme, by repealing an essential and vital feature thereof.

We have already presented in our brief the authorities to support our contention, so will not repeat them here.

In the premises we respectfully submit that we are entitled to have this point considered and decided by this Court, and accordingly petition for a rehearing.

Dated, San Francisco,
October 4, 1916.

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Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

WARREN GREGORY,
Of Counsel for Appellant and Petitioner.